FILE COPY

Office Supreme Court, U. S.
FILED
MAR 30 19
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

[redacted] 6

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relator, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

[redacted] 7

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

[redacted] 8

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

Respondent.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

FREDERIC R. COUDERT,
FREDERIC R. COUDERT, JR.,
Of Counsel for Respondents.

SUBJECT INDEX.

	PAGE
The Opinions of the Courts below	1
The Facts and the Issue	2
Argument	2
Petitioners' Points	6
Conclusion	7

Table of Cases Cited.

Ex Parte McCabe, 46 Fed. 363 (1891)	3
Charlton *v.* Kelly, 229 U. S. 447	4
Giozza *v.* Tiernan, 148 U. S. 657	6
Harvard Research in International Law, Part I, Extradition, p. 124, Note 10 (1935)	3
In re Galway, (1896) 1 Q. B. 230	6
Moore on Extradition, Vol. I, § 135	3

SUPREME COURT OF THE UNITED STATES

LEWIS J. VALENTINE, Police Commissioner of the City of New York, EDWARD T. V. FITZGERALD, his Agent having in custody the Relator, and CHARLES DE FERRY DE FONTNOUVELLE, Consul General of the French Republic,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of B. COLES NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of GEORGE W. NEIDECKER,

Respondent.

THE SAME,

Petitioners,

against

UNITED STATES OF AMERICA on the Relation of AUBREY NEIDECKER,

Respondent.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinions Below.

The opinion of the District Court appears at R. 20; those of the Circuit Court of Appeals at R. 58-68. Neither has been reported.

The Facts and the Issue.

The facts are simple; the issue narrow. Both are completely dealt with in the admirable opinion of the Court below (R. 51). The Extradition Treaty of 1909 with France provides that:

> "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

Respondents, native born American citizens, having been taken into custody by the New York Police Department upon a preliminary warrant of a United States Commissioner, issued upon application of the Acting Consulate General of France, sued out these writs of habeas corpus.

The sole question presented is whether respondents are subject to operation of the Treaty.

ARGUMENT.

The Circuit Court of Appeals properly held that respondents were exempt from extradition under the Treaty.

The Treaty clause which this Court is now asked to construe first appeared in the extradition treaty with Prussia in 1852. Between 1852 and 1874 the same clause appeared in eight additional treaties.

In 1874 Secretary of State Fish refused the request of Mexico for extradition of an American citizen upon the ground that an identical treaty clause absolutely exempted nationals. In 1884, 1888 and in 1891, the Mexican Treaty was similarly construed by Secretaries Frelinghuysen, Bayard and Blaine.

Secretary Frelinghuysen said:

> "'I understand the treaty with Mexico as reading thus:
>
> 'The President shall be bound to surrender any person guilty of crime *unless such person is a citizen of the United States*'."

Secretary Blaine declared that the clause had been "held to preclude the surrender of a citizen of the United States."

The foregoing Executive decisions were predicated upon the principle that the President is without power to banish American citizens under the Constitution and that such power can only arise under authority conferred by treaty; that the treaty in question, having expressly excepted citizens from its obligation, does not confer such power.

In 1891 the United States District Court in Texas was called upon to construe the Mexican Treaty upon petition for a writ of habeas corpus. *Ex Parte McCabe,* 46 Fed. 363. In a well considered opinion the Court sustained the position taken by the State Department upon the four occasions above referred to. This is the leading case upon the subject. Its authority has been, and is, uniformly recognized by the State Department, text writers, and at least implicitly by the United States Supreme Court in *Charlton* v. *Kelly,* 229 U. S. 447.

> Moore on Extradition, Vol. I, §135,
> Harvard Research in International Law, Part I, Extradition, p. 124, Note 10 (1935).

That the State Department presently recognizes the authority of the *McCabe* decision was conceded by counsel for petitioners upon the argument in the District Court (R. 27).

Between 1891, the date of the *McCabe* decision, and 1909, the date of the present French Treaty, there were negotiated twenty extradition treaties of which fourteen adopted the clause used in the present Treaty. The remaining six employed the formula used in the Japanese Treaty of 1886 which was in the following language:

> "Neither government shall be bound to deliver its own citizens for extradition under this convention; *but either shall have the power to deliver them up if in its discretion it be deemed proper to do so.*"

It will be noted that this clause constitutes a radical innovation in that it expressly purports to confer that discretionary power the existence of which had been denied by the State Department and the District Court in construing treaties not containing such express grant of power.

While the present clause has been repeatedly used right up to the present time, the Japanese formula was last used in the Nicaraguan Treaty of 1905. The present clause now appears in all but an insignificant number of our current extradition treaties.

This Court, in *Charlton* v. *Kelly*, supra, undertook an analysis of the extradition treaties in force at 1910. While the decision itself is not in point, the analysis is very much so. The Court classified our extradition treaties in two categories:

> "The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of 'persons' without limitation or qualification are the following:
>
> With Great Britain, August 9, 1842, * * *;
> With France, November 9th, 1843, * * *;
> With Italy, February 8, 1868, * * *;
> With Venezuela, August 27, 1860, * * *;
> With Ecuador, June 28, 1872, * * *;
> With Dominican Republic, February 8, 1867, * * *."

It is quite clear, therefore, that this Court considered that all other extradition treaties, including those containing the clause in question, fell within the category of "those which expressly exempt citizens."

No exception to the extradition of citizens was contained in the original treaty with France of 1843. Having failed for a period of sixty-six years to obtain the extradition of a single Frenchman under that treaty, the United States in 1909 brought about the modification thereof by the addi-

tion of the present formula, become classic, as the result of more than sixty years of use and interpretation by administrative, legislative and judicial authorities.

Surely the treaty making power must have intended to employ such formula with its theretofore acquired significance! In the words of the prevailing opinion below (R. 56),

> "We are dealing with a clause chosen by the President and Senate out of a diplomatic locker and encrusted with its proper traditions which in such matters count for much."

This clause cannot be adequately construed without regard to its historic background. So considered, the intent of the treaty making power is plain. It is not for the courts to rewrite treaties, especially those of long standing. Had the President and Senate been dissatisfied with the results following the construction adopted by the State Department and the judiciary, it would have been a simple matter to employ different language in making this treaty.

At the time of the negotiation of the present treaty the State Department had before it three recognized treaty formulae for dealing with this question:

1. That applicable to all persons regardless of citizenship;
2. That purporting to confer discretion upon the Executive in the case of citizens, as in the Japanese Treaty; and
3. The formula found in the treaty at bar.

The selection of the third evidenced a clear intent to absolutely exempt American citizens from operation of the treaty.

Moreover, the construction contended for by petitioners raises a grave constitutional question. To permit the President unfettered discretion in the matter of deportation of citizens, is to confer upon him an arbitrary power

violative of the Fifth Amendment. It would authorize an arbitrary "discrimination in favor of one as against another of the same class" (*Giozza* v. *Tiernan*, 148 U. S. 657, 662), the class in this instance, consisting of American nationals who would be subject to operation of the Treaty save for their nationality.

Petitioners' Points.

Petitioners urge that as there is no applicable decision by this Court, the writ should be granted. It is difficult to see what purpose would be served by review unless this Court should feel that the Circuit Court of Appeals has erred in following the precedents of sixy years. If correct, the decision below places an adequate seal of authority upon the traditional interpretation, particularly, if buttressed by refusal to grant certiorari. To reverse, would be in substance to rewrite the bulk of our extradition treaties now in force.

As Petitioners point out (p. 5, Petition), there are now in force thirty-two other extradition treaties containing the present clause. To rewrite this vast body of treaty law is scarcely a judicial function. Yet this is precisely what Petitioners would have this Court do, not at the behest of the State Department, but at the request of a foreign government which has uniformly refused to permit extradition of its own citizens.

Petitioners, likewise, suggested that there is a conflict of authorities. This is not the case. The American authorities, executive and judicial, have been uniform throughout this long period. Petitioners rely solely upon an English decision which they contend takes a contrary view. *In re Galway* (1896) 1 Q. B. 230. An analysis of this decision leads ineluctably to the conclusion that by a parity of reasoning it is wholly in favor of relators' position. In the language of Hand, J. in the Court below, Petitioners' contention was effectively disposed of thus (R. 54):

"A ruling of an English court merely goes to show how completely the clause should be interpreted by its history. Before 1887 the Extradition Treaty between Belgium and Great Britain had forbidden any surrender of nationals at all. (*Regina* v. *Wilson*, 3 Q. B. 42.) In that year it was amended and what we have called the Prussian clause was substituted. Obviously, the amendment meant to make a change. It would make none at all if the court continued to treat it as an exemption. The situation was just the reverse of that before us now; that is an amendment to modify a treaty which had compelled the surrender of all nationals. Nothing relevant for us can therefore be inferred because *In re Galway* held that 'a discretionary power had been conferred'."

The original French Treaty of 1843, having failed of its purpose to bring about the extradition of all nationals, was amended to bring it into conformity with the facts and practise of one of the parties by completely exempting nationals of both parties and so restoring that reciprocity which is the foundation of treaty relations.

CONCLUSION.

The petition for writs of certiorari should be denied.

Respectfully submitted,

FREDERIC R. COUDERT, JR.,
Attorney for Respondents,
Office & P. O. Address,
No. 2 Rector Street,
Borough of Manhattan,
City of New York.

FREDERIC R. COUDERT

FREDERIC R. COUDERT, JR.,
[redacted],
Of Counsel.